Dr Vijaya Kumar a/l Vasudeavan & Ors v Majlis Perubatan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3–21–99 OF 2004
MOHD HISHAMUDIN J
31 JANUARY 2008

Civil Procedure — Striking out — Statement of claim — Medical graduates with degrees from unrecognised universities — Allegation that Ministry of Health discriminatory and arbitrary in failing to accord recognition to universities — Whether plaintiffs' allegations scandalous, frivolous and vexatious

Evidence — Documentary evidence — Newspaper report — Cabinet directing Health Minister to exercise powers to employ medical graduates from unrecognised universities as doctors — Denial by Health Minister — Whether newspaper report sufficient evidence

Professions — Medical practitioners — Qualification — Medical graduates with degrees from unrecognised universities — Cabinet directing Health Minister to exercise powers to employ medical graduates from unrecognised universities as doctors — Whether Health Minister could exercise his power of exemption under s 14(3) of the Medical Act 1971

The plaintiffs were holders of medical degrees from universities other than the institutions specified in the Second Schedule to the Medical Act 1971 ('the Act'). In order to be entitled to be provisionally registered as medical practitioners in Malaysia, the plaintiffs applied to the first defendant to register for the examination under the Medical (Setting of Examination for Provisional Registration) Regulations 1993. The first defendant processed their applications and the plaintiffs were allocated places in the universities of the third, fourth and fifth defendants by way of balloting to undertake the said examination. The plaintiffs then underwent a six-month attachment course in 2003 at the respective universities which culminated in the examination. The plaintiffs failed the examination and were therefore not entitled to be provisionally registered as medical practitioners. The plaintiffs commenced an action against the defendants and alleged: (a) that the second defendant was discriminatory and arbitrary in failing to accord recognition to the universities the plaintiffs attended; and (b) that the second defendant

failed to implement a Cabinet decision dated 6 February 2002 directing him to exercise his powers under s 14(3) of the Act to allow medical graduates with degrees from unrecognised universities, including the plaintiffs, to practise as doctors in the government service. The first, second and fifth defendants' application under O 18 r 19(1) of the Rules of the High Court 1980 to strike out the plaintiffs' statement of claim on the grounds that the plaintiffs' suit was scandalous, frivolous and vexatious and an abuse of the process of court was allowed by the senior assistant registrar. Hence this appeal against the decision.

Held, dismissing the plaintiffs' appeals with costs:

(1) It was highly improbable that there was a Cabinet directive directing the Health Minister to exercise his powers under s 14(3) of the Act to employ two hundred medical graduates from unrecognised universities as doctors. Under sub-s (3) of s 14, the power to register medical graduates from unrecognised universities (without requiring them to undergo the examination prescribed by s 12(1)(aa) of the Act) was conferred on the Minister of Health and not on the Cabinet. The Cabinet could not exercise this power; nor could the Minister of Health surrender this power to the Cabinet. The Minister must exercise his own discretion in consultation with the Malaysian Medical Council (see paras 10–12).

(2) Further, before the Minister could exercise his power of exemption under s 14(3), there must be a person interested in seeking registration and had submitted his application to the Minister. The Minister could not on his own volition register a person if that person did not apply to register. There was nothing in the statement of claim stating that any of the plaintiffs had made an application seeking registration under sub-s (3) of s 14 (see para 14).

(3) There was misconception in the contention that the second defendant had discriminated against the universities from which the plaintiffs had graduated by not recognising the universities as it was not the function of the second defendant to recognise or not to recognise a university. This was determined by the Act. Although under s 12(2), the Minister had the power to add to the Second Schedule universities which hitherto were not recognised. But before the Minister could exercise his powers (after consulting the council), there must first be an application made to the Minister by the university that desires to be recognised. However, there was no affidavit evidence adduced by the plaintiffs that there had been applications made by the universities from which they had graduated for recognition (see paras 15–16).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pemegang ijazah perubatan daripada universiti-universiti selain daripada institusi-institusi yang disenaraikan di Jadual Kedua Akta Perubatan 1971 ('Akta tersebut'). Untuk membolehkan mereka didaftarkan sebagai pengamal perubatan sementara di Malaysia, plaintif-plaintif memohon kepada defendan pertama untuk mendaftarkan diri untuk peperiksaan di bawah Peraturan-Peraturan Perubatan (Mengadakan Peperiksaan Bagi Pendaftaran Sementara) 1993. Defendan pertama telah memproses permohonan mereka dan plaintif-plaintif telah diberikan tempat-tempat di universiti-universiti defendan ketiga, keempat dan kelima secara pengundian untuk mengambil peperiksaan tersebut. Plaintif-plaintif kemudiannya menjalani kursus penempatan selama enam bulan pada 2003 di universiti-universiti masing-masing yang berakhir dengan peperiksaan tersebut. Plaintif-plaintif gagal dalam peperiksaan tersebut dan dengan itu mereka tidak berhak didaftarkan sebagai pengamal-pengamal perubatan sementara. Plaintif-plaintif memulakan tindakan terhadap defendan-defendan dan mendakwa: (a) bahawa defendan kedua telah berdiskriminasi dan membuat keputusan yang sebarangan kerana gagal memberikan pengiktirafan kepada universiti-universiti yang plaintif-plaintif masuki; dan (b) defendan kedua gagal melaksanakan keputusan Kabinet bertarikh 6 Februari 2002 yang mengarahkannya untuk menggunakan kuasanya di bawah s 14(3) Akta tersebut untuk membenarkan siswazah-siswazah perubatan dengan ijazah daripada universiti-universiti yang tidak diiktiraf, termasuk plaintif-plaintif, untuk beramal sebagai doktor-doktor di dalam perkhidmatan kerajaan. Permohonan defendan pertama, kedua dan kelima di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan pernyataan tuntutan plaintif atas alasan-alasan bahawa tindakan plaintif adalah mengaibkan, remeh dan menyusahkan, serta menyalahi proses mahkamah telah dibenarkan oleh penolong kanan pendaftar. Maka rayuan ini terhadap keputusan tersebut.

Diputuskan, menolak rayuan plaintif-plaintif dengan kos:

(1) Adalah sukar untuk dipercayai bahawa terdapatnya arahan daripada Kabinet yang mengarahkan Menteri Kesihatan untuk menggunakan kuasanya di bawah s 14(3) Akta tersebut untuk mengambil bekerja dua ratus siswazah perubatan sebagai doktor daripada universiti-universiti yang tidak diiktiraf. Di bawah sub-s (3) s 14, kuasa untuk mendaftarkan siswazah-siswazah perubatan daripada universiti-universiti yang tidak diiktiraf (tanpa memerlukan mereka menjalani peperiksaan yang diperuntukkan di bawah s 12(1)(aa) Akta tersebut) adalah diberikan kepada Kementerian Kesihatan dan

bukannya kepada Kabinet. Kabinet tidak dapat menggunakan kuasa ini; Kementerian Kesihatan juga tidak boleh menyerahkan kuasanya kepada Kabinet. Menteri tersebut mesti menggunakan budi bicaranya sendiri dalam berunding dengan Majlis Perubatan Malaysia (lihat perenggan 10–12).

(2) Selanjutnya, sebelum Menteri tersebut dapat menggunakan kuasa pengecualiannya di bawah s 14(3), mestilah terdapat seorang yang berkepentingan untuk menuntut pendaftaran dan telah mengemukakan permohonannya kepada Menteri tersebut. Menteri tersebut tidak boleh secara sukarela mendaftarkan seseorang sekiranya orang tersebut tidak memohon untuk didaftarkan. Tidak terdapat langsung di dalam pernyataan tuntutan yang menyatakan bahawa mana-mana di antara plaintif-plaintif telah membuat permohonan untuk menuntut pendaftaran di bawah sub-s (3) s 14 (lihat perenggan 14).

(3) Terdapat salah faham di dalam penegasan bahawa defendan kedua telah berdiskriminasi terhadap universiti-universiti di mana plaintif-plaintif lulus dengan tidak mengiktiraf universiti-universiti tersebut. Ini kerana ia bukan fungsi defendan kedua untuk mengiktiraf atau tidak mengiktiraf sesuatu universiti. Perkara ini diputuskan oleh Akta tersebut. Walaupun di bawah s 12(2), Menteri mempunyai kuasa untuk menambahkan kepada jadual kedua universiti-universiti yang sebelum ini tidak diiktiraf. Akan tetapi sebelum Menteri tersebut dapat menggunakan kuasanya (selepas berunding dengan majlis), mestilah terdapat permohonan yang dibuat kepada Menteri oleh universiti yang ingin diiktiraf. Akan tetapi, tiada keterangan afidavit yang dikemukakan oleh plaintif-plaintif bahawa terdapatnya permohonan yang dibuat oleh universiti-universiti yang mana mereka mendapat ijazah untuk pengiktirafan (lihat perenggan 15–16).]

Notes

For a case on newspaper report, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 1203.

For cases on qualification of medical practitioners, see 10 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1642–1643.

For cases on striking out of statement of claim, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6750–6786.

Legislation referred to

Federal Constitution arts 8, 43
Medical (Setting of Examination for Provisional Registration) Regulations 1993
Medical Act 1971 ss 12(1)(a)(ii), 12(1)(aa), 12(2), 14(3)
Rules of the High Court 1980 O 18 r 19(1)

Muhammad Faiz Fadzil (Aris Rizal Christopher Fernando & Co) for the plaintiffs.
V Premshangar (Lewis & Co) for the first defendant.
Adam Abdullah (S Maniarasan with him) (Adam Abdullah & Mani) for the fifth defendant.

Mohd Hishamudin J:

[1] Enclosures 61, 65 and 84 are the plaintiffs' appeals against the decision of the learned senior assistant registrar in allowing the first (Malaysian Medical Council), second (Minister of Health) and fifth (Universiti Sains Malaysia) defendants' application under O 18 r 19(1) of the Rules of the High Court 1980 to strike out the plaintiffs' statement of claim on the grounds that the plaintiffs' suit against the third defendant is scandalous, frivolous and vexatious and an abuse of the process of court.

[2] I had, on 13 March 2007, on the oral application of the learned senior federal counsel (Puan Narkunavathy Sundaresan), appearing for the second defendant, which was supported by learned counsel (Encik V Premshangar) for the first defendant and the learned counsel (Encik Adam Abdullah) for the fifth defendant, and after hearing the objection by learned counsel (Encik Muhammad Faiz Fadzil) for the plaintiffs, ordered that the three appeals of the plaintiffs be heard together.

[3] After considering the affidavits as well as the written submissions of all parties concerned, I have dismissed the appeals with costs; and I now give the grounds for my decision.

[4] I am satisfied the suit is scandalous, frivolous and vexatious as well as an abuse of the process of the court. In fact earlier, on 25 January 2006, I had struck out the plaintiffs' statement of claim against the third defendant (University of Malaya) on the ground that the claim was scandalous, frivolous and vexatious and an abuse of the process of the court.

[5] The plaintiffs are holders of medical degrees from universities other than the institutions specified in the Second Schedule to the Medical Act 1971 ('unrecognised universities'). In order to be entitled to be provisionally registered as medical practitioners in Malaysia, the plaintiffs applied to the first defendant to register for the examination under the Medical (Setting of Examination for Provisional Registration) Regulations 1993. The first defendant processed their applications and the plaintiffs were allocated places in the universities of the third, fourth and fifth defendants by way of balloting to undertake the said examination.

[6] The plaintiffs then underwent a six-month attachment course in 2003 at the respective universities which culminated in examination. The plaintiffs failed the examination and were therefore not entitled to be provisionally registered as medical practitioners.

[7] The plaintiffs allege:

(a) that the second defendant was discriminatory and arbitrary in failing to accord recognition to the universities the plaintiffs attended; and

(b) that the second defendant failed to implement a Cabinet decision dated 6 February 2002 directing him to exercise his powers under s 14(3) of the Medical Act 1971 to allow medical graduates with degrees from unrecognised universities, including the plaintiffs, to practise as doctors in the government service.

[8] The plaintiffs prayed for the following reliefs:

(a) a declaration that the plaintiffs have the right to be allowed to practise as doctors in accordance with art 8 of the Federal Constitution;

(b) a declaration that the second defendant ought to exercise his powers under s 14(3) of the Medical Act 1971 as authorised and directed by the Cabinet.

(c) a declaration that the plaintiffs have the right to practise as doctors after having completed the six-month attachment;

(d) a declaration that the plaintiffs have the right to be provisionally registered under s 12(1)(a)(ii) of the Medical Act 1971 after having done their six months attachment; and

(e) damages.

[9] Central to the plaintiffs' case is an alleged Cabinet directive of 6 February 2002. References to this alleged Cabinet directive can be found at paras 13.1, 13.2, 13.3, 13.4 and 13.5 of the statement of claim. For convenience I shall set out these paragraphs:

> 13.1 Defendan Kedua telah mengumumkan (seperti yang dilapurkan dalam *The Star* bertarikh 8 Februari 2003) bahawa Kabinet telah memutuskan pada 6 Februari 2002 bahawa dianggarkan sebanyak 200 siswazah perubatan yang memperolehi ijazah tidak diiktiraf kini dibenarkan untuk mengamal sebagai doctor kerajaan untuk mengatasi masalah kekurangan 3,500 doktor di Negara ini. Defendan Kedua dibenarkan untuk menggunakan kuasanya di bawah s 14(3) Akta Perubatan 1971 untuk melaksanakan keputusan tersebut di atas.

Under cl 14(3) the Health Minister upon consultation with the Malaysian Medical Council, is empowered to allow these medical graduates to undergo three years of training and three years of compulsory service with the government.

They are now required to submit their applications to the Health Minister. It (applications) will subsequently be forwarded to the MMC for consultation before processing by the Health Director-General for placements in government medical facilities. Those found eligible under s 14(3) could start practicing now without having to sit for their final year examination in the three Universities.

13.2 *The New Straits Times* telah melaporkan pada 8 Februari 2002 di bawah tajuk: 'Doctors from unaccredited varsities to get a chance.'

The Cabinet will allow the Health Ministry to employ Malaysians from unaccredited foreign medical Universities to help resolve the perennial shortage of doctors.

Applicants only have to undergo a year's housemanship and two years supervision under a specialist or the Director-General of Health.

Health Minister Datuk Chua Jui Meng said they could be required to sign a compulsory three-year bond with the government. All they have to do is to write to me (to be accepted as doctors).

13.3 *The Sun* bertarikh 17 Februari 2003 melaporkan Bernama yang memetik kenyataan Menteri Kesihatan Datuk Chua Jui Meng di bawah tajuk:

MOVE ON DOCS WON'T EFFECT SERVICE QUALITY

Previously medical graduates from unaccredited universities had to sit for a qualifying examination in local universities to be eligible to join the government service.

With the Cabinet approval, the doctors can now decide whether to sit for the examination or not.

If they pass the examination, they only need to do housemanship for a year followed by three years' compulsory service with the government. Those who choose to forgo the examination need to undergo the one-year housemanship followed by two years' supervision under a senior doctor and specialist and three years' of mandatory service with the government.

13.4 Berikutan dengan keputusan tersebut di atas, Kabinet telah memberi kuasa dan mengarahkan Menteri Kesihatan di bawah artikel 43 Perlembagaan Persekutuan untuk menggunakan kuasanya di bawah s 14(3) Akta tersebut untuk melaksanakan keputusan kerajaan untuk menggaji 200 orang doktor termasuk Plaintif-Plaintif.

13.5 Kabinet mempunyai kausa untuk menentukan polisi kerajaan untuk kepentingan awam dan untuk menggunakan kausa eksekutifnya melalui defendan kedua. Amatlah jelas bahawa defendan kedua gagal untuk mengimplementasikan

keputusan kerajaan tersebut, dengan itu menyebabkan plaintif dinafikan hak-hak, kelayakan dan kehilangan mata pencarian.

[10] The above averments allege that there were reports in *The Star*, *The New Straits Times* and *The Sun* stating that the Health Minister had been directed by the Cabinet to exercise his powers under s 14(3) of the Medical Act 1971 to employ two hundred medical graduates from unrecognised universities as doctors. The Minister in his affidavit has denied that there was such a Cabinet directive. When there is this denial by the Minister it is incumbent upon the plaintiffs to substantiate their claim. It is not sufficient for the plaintiffs to rely merely on newspaper reports. But the plaintiffs have failed to substantiate their allegation.

[11] In my judgment it is highly improbable that there was such a Cabinet directive. Under sub-s (3) of s 14, the power to register medical graduates from unrecognised universities (without requiring them to undergo the examination prescribed by s 12(1)(aa) of the Medical Act 1971) is conferred on the Minister of Health and not on the Cabinet. The provision is very clear on this. The provision reads:

> (3) Notwithstanding anything to the contrary contained in this Act, any person may be fully registered under this section subject to such restrictions and conditions as may be stipulated by the Minister, provided that the person seeking registration under this subsection possesses a qualification with respect to which the Minister, after consulting the Council, is satisfied that it is adequate.

[12] The Cabinet cannot exercise this power; nor can the Minister of Health surrender this power to the Cabinet. The Minister must exercise his own discretion. Even then, the Minister cannot act alone. He acts in consultation with the Malaysian Medical Council. For the subsection says:

> … after consulting the council …

[13] True, the Minister is not bound by the views of the council. But nonetheless he must seek its view and must respect and give due consideration to the council's view. Consulting the council is not a mere formality. The Cabinet has no place in the scheme of sub-s (3) of s 14. To say that the Cabinet can direct the Minister as to how he should his powers under sub-s (3) of s 14 is to labour under a serious misconception. But learned counsel for the plaintiffs in his argument (that the Minister must implement the directive of the Cabinet) has referred to art 43 of the Federal Constitution. I have examined this article. With respect, I find this article irrelevant.

[14] Further, do note the words:

> … provided that the person seeking registration under this subsection …

in sub-s (3). This means that before the Minister can exercise his power of exemption under s 14(3), there must be a person interested in seeking registration and has submitted his application to the Minister. The Minister cannot on his own volition register a person if that person does not apply to register. In this regard, I have examined the statement of claim, but I find that there is nothing in the statement of claim stating that the plaintiffs (or any of those 24 persons listed in Annexure 'A') have made an application seeking registration under sub-s (3) of s 14.

[15] With regard to the contention of the plaintiffs that the second defendant had discriminated against the universities from which they had graduated by not recognising the universities, there is a misconception here. It is not the function of the second defendant to recognise or not to recognise a university. On the matter as to whether or not to recognise a university, this is determined by an Act of Parliament — the Medical Act 1971. Section 12 of the Act states:

> 12 Persons entitled to provisional registration.
>
> (1) Subject to this Act and the regulations thereunder, a person shall be entitled to be provisionally registered as a medical practitioner, solely for the purpose of obtaining the experience specified in section 13, upon application to the Registrar in the prescribed form if:
>
> (a) he holds:
>
> (i) any of the qualifications specified in the third column of the Second Schedule granted by an institution specified in relation to that qualification in the second column of that Schedule; or
>
> (ii) a qualification in medicine and surgery other than the qualifications referred to in subparagraph (i), deemed suitable for registration by the Minister after consulting the Council;
>
> (aa) in the case of a person who holds a qualification referred to in subparagraph (a)(ii), he has passed such examination as may be prescribed or set for the purpose of this paragraph by a body approved by the Minister; and
>
> (b) he produces to the Registrar evidence to the satisfaction of the Registrar that, subject to his being provisionally registered, he has been selected —

A (i) for employment under subsection 13(2) or that he is eligible to be exempted therefrom under subsection 13(6).

(ii) [deleted]

B (2) The Minister may from time to time, after consulting the Council, add to, delete from or amend the Second Schedule by order published in the Gazette.

C **[16]** The universities or institutions that are recognised are those that are listed in the Second Schedule. It is true that by virtue of sub-s (2) of s 12 above the Minister has the power (to be exercised by an order) to add to the Second Schedule universities which hitherto are not recognised. But before the Minister can exercise his powers (after consulting the Council) under the above sub-s (2) of s 12, there must first be an application made to the D Minister by the university that desires to be recognised. However, there is no affidavit evidence adduced by the plaintiffs that there had been applications made by the universities from which they had graduated for recognition.

E **[17]** In relation to the fifth defendant, learned counsel for the plaintiffs submits that the plaintiffs and the 24 persons named in Annexure A, when sitting for the examination, were discriminated by the fifth defendant (as well as by the third and fourth defendants, with whom we are not concern in these appeals). I find that the allegations (which are denied by the fifth defendant) F such as:

(a) that the fifth defendant deliberately passed its own local students and deliberately failed the plaintiffs;

(b) that during the examination the fifth defendant allowed its own local G students to answer the examination questions either in Bahasa Malaysia or in the English language, but did not allow the plaintiffs to write their answers in Bahasa Malaysia; and

(c) that for the purpose of the examination the plaintiffs were given H examination registration numbers which were different from those given to local students, so that the examiners would be able to identify the plaintiffs' answer scripts;

are too general in nature and rather far fetched. Hence I find it difficult to believe the allegations. Whilst the plaintiffs' allegations lack detail particulars I and are unsubstantiated, the fifth defendant, on the other hand, in its affidavit has produced documentary evidence that rebuts the allegations, and which satisfies me that the plaintiffs' allegations are scandalous, frivolous and vexatious.

[18] In relation to the first defendant the statement of claim is not clear as to the nature of the plaintiffs' cause of action against the council.

Order accordingly.

Reported by Sally Kee